

With AT&T/T-Mobile, wireless net neutrality should be back on the table

The fear and loathing index on AT&T's proposed acquisition of T-Mobile just keeps rising. The latest negative input comes from The Economist in an editorial titled "Not so fast, Ma Bell." The magazine blows off AT&T's claim that the merger will "further improve the customer experience" by making AT&T more competitive with Verizon.

"This new-found zeal for serving consumers needs to be taken with a pinch of salt," the essay warns. "AT&T now gets the worst customer-satisfaction ratings among the main mobile operators. The deeper question is whether two [big carriers] is enough, especially in a business that is evolving as fast, and becoming as important to people's lives, as mobile communications."

The piece concludes by sharing "the suspicion" that President Obama, "desperate both to build some broken fences with big business and to make progress on connecting every American home to the Internet, will give in" to the deal.

But that's not what the Wall Street Journal is reporting. The newspaper quotes an unnamed source at the Federal Communications Commission calling this proposal anything but a done deal, with heavy vetting from the government inevitable.

"There's no way the chairman's office rubber-stamps this transaction," the FCC official told the Journal. "It will be a steep climb to say the least."

If that is so, somewhere along that trek perhaps the Commission should reconsider its decision to largely exempt wireless broadband from its net neutrality Order.

Ancient history

Back when the movement for strong open Internet rules included a company called Google, it was generally agreed among such advocates that clear federal agency provisions against protocol blocking and unreasonable discrimination should be applied to last-mile wireless and wireline broadband connections alike.

"Notwithstanding any technical differences between wireline and wireless networks that may justify different application of the reasonable network management exception on a case-by-case basis," Google insisted in April of 2010, "the record is clear that all last-mile broadband network providers have common incentives to discriminate in the absence of an effective and enforceable rule protecting consumers and competitors."

The search engine giant's attorneys noted that while the number of mobile wireless subscribers is

growing, "the number of service providers actually is contracting," with AT&T and Verizon controlling over 60 percent of the national wireless market. "Further, these two providers' wireless, video, voice, and data offerings are substantially vertically integrated with?and their motivations to discriminate are tied to?their affiliates' wireline networks," Google added. Hence the need to keep wireless mobile in the net neutrality picture.

All these concerns vaporized, of course, once Google made policy peace with its Droid partner Verizon last August. The two companies then issued their famous Legislative Framework proposal that would deny the FCC even the authority to make hard-and-fast rules on its own. Suddenly the distinct and delicate nature of wireless broadband was discovered.

"Because of the unique technical and operational characteristics of wireless networks, and the competitive and still-developing nature of wireless broadband services, only [a] transparency principle would apply to wireless broadband at this time," Google and Verizon opined.

So when the FCC finally issued its long awaited and partially Congressionally disapproved-of net neutrality rules in December, the Commission dutifully exempted wireless from all but the aforementioned transparency provision and a bar on the outright blocking of content.

"Most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband," the order observed in defense of this decision.

Premature predictions

Now, however, with AT&T's bid to gobble up T-Mobile, all these competition rationales return to haunt their advocates. After all, in 2010 both the Department of Justice and the National Telecommunications Information Agency wondered out loud whether wireless broadband would really make the residential broadband sector more competitive.

"Although early projections from [the] industry are encouraging, it is premature to predict when, or even whether, these wireless broadband services will provide the competitive alternatives that can benefit consumers of all services, including wireline," NTIA chief Larry Strickling wrote to the FCC.

And although the DoJ called wireless developments "mildly encouraging," the agency's analysis warned that it was "premature to predict" whether wireless companies will "discipline the behavior of the established wireline providers."

Those underwhelming assessments were delivered before the second- and fourth-largest wireless carriers in the United States proposed to merge.

Having reviewed this history, it should be noted that the road to reconsidering wireless net neutrality is anything but assured. The FCC hasn't even formally released its open Internet rules by publishing them in the Federal Register. Not that that's stopped Verizon and MetroPCS from suing the agency over them, or Congressional Republicans from issuing a resolution of disapproval against them in the House Commerce Committee.

But let's remember that when AT&T acquired BellSouth, the FCC negotiated conditions that the agency adopted on December 29, 2006 included a requirement that explicitly rolled out the concept:

Net Neutrality

1. Effective on the Merger Closing Date, and continuing for 30 months thereafter, AT&T/BellSouth will conduct business in a manner that comports with the principles set forth in the Commission's Policy Statement, issued September 23, 2005 (FCC 05-151).

2. AT&T/BellSouth also commits that it will maintain a neutral network and neutral routing in its wireline broadband Internet access service. This commitment shall be satisfied by AT&T/BellSouth's agreement not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination.

The government's decision to waive unfair discrimination provisions against wireless broadband was based on a widely vetted evaluation of the competitive nature of that market. Surely, a proposal that would result in one carrier controlling almost 42 percent of wireless subscriber share changes that assessment. The FCC, FTC, Department of Justice, and Congress must now decide how much.